

COMMENTS ON THE PROPOSED REVISION OF THEFT AND DECEPTION OFFENSES IN OHIO

I. INTRODUCTION

To appreciate the need for a revision of the Ohio offenses relating to misappropriation of property by theft or deception, it is helpful to have in mind the history of the common law crime of larceny. An understanding of the common law is necessary because even though Ohio is said to have only statutory crimes,¹ some statutes are so vague that the courts have turned to common law precedents to give them meaning. A good example of such a legislative enactment is found in the Ohio Revised Code larceny section: "No person shall steal anything of value."² The Ohio Supreme Court has concluded: "Larceny, under the statute of this state, is the same as at common law, and may be defined to be the felonious taking and carrying away of the personal property of another."³ There is, however, an unhappy consequence in adopting the common law definition of the crime, a consequence described by Professor Perkins:

Under the early law felonies were punishable by death, and larceny was a common law felony. . . . The judges, confronted with a strict law which called for execution in felony cases (other than petit larceny), resorted to various devices to prevent excessive executions. One such device was to point out some peculiarity in the manner in which property had been appropriated in a particular case and to hold that such a misdeed did not constitute larceny.

This tendency resulted in many loop-holes in the enforcement of justice and from time to time statutes were enacted in the effort to fill these gaps. These statutes provided penalties (ordinarily less than death) for certain misdeeds that had been held not to constitute larceny. The result is a patchwork of offenses. The intricacies of this patchwork pattern are interesting as a matter of history but embarrassing as a matter of law enforcement. The judge is forced to take notice of hair-splitting distinctions between various types of wrongful appropriation which are merely the result of historical accident, and contribute nothing to the social problem of protecting the property of individuals from predatory acts of others.⁴

A few examples should suffice to indicate the inadequacy of the present law. It is essential to common law larceny that there be a "trespassory taking;"⁵ that is, an appropriation without the consent of the owner. If consent is obtained by deception, perhaps the actor can be prosecuted for larceny by trick;⁶ however, that is an offense different than larceny.

¹ See *Smith v. State*, 12 Ohio St. 466, 469 (1861).

² OHIO REV. CODE ANN. § 2907.20 (Page Supp. 1970).

³ *Stanley v. State*, 24 Ohio St. 166, 170 (1873).

⁴ R. PERKINS, PERKINS ON CRIMINAL LAW 232-33 (2d ed. 1969).

⁵ *Id.* at 234.

⁶ See *State v. Singleton*, 85 Ohio App. 245, 260-61, 87 N.E.2d 358, 366-67 (Cuyahoga County 1949).

If an employee has been entrusted with property which he has wrongfully converted, he might be convicted under the embezzlement statute,⁷ but again, there is no larceny. In spite of the fact that all these crimes deal with fundamentally similar types of acquisitive conduct, Ohio law provides that if the facts of the trial show commission of an offense at variance with that charged by the prosecution, the defendant may be acquitted.⁸ The existing bulk, repetition, and fragmentation in the law of theft present a continuing threat to the efficient administration of criminal justice.

It is ironic that this same body of law is also underinclusive; that is, it fails to cover all of the interests which should be protected. Perhaps the most glaring example of this problem can be seen in the exclusion of services from the scope of larceny. Under present Ohio law, only personal property can be the subject of a larceny. In an economy that is increasingly service-oriented, this restriction seems completely arbitrary. From the perspective of a victim of a theft, it should make no difference whether the loss is of a thing or of a fee—both are social harms which should be treated equally. While the omission of services might be corrected by remedial legislation, this is precisely the piecemeal approach which has left the law in such an unsatisfactory state. A revision of the fundamental structure of the offenses of theft and deception is clearly needed. The drafters of the Proposed Ohio Criminal Code⁹ recognized this need in stating that it was their goal to produce a "compact yet complete substantive criminal code. . . ."¹⁰ It is the purpose of this note to consider the changes in the theft and fraud offenses suggested in the Proposed Code both in its original form and in the form passed by the Ohio House of Representatives.¹¹

II. CONSOLIDATION OF OFFENSES

An examination of the chapter dealing with theft and fraud begins with § 2913.02, the basic theft section which contains one of the most sweeping consolidation efforts of the Proposed Code. In language that is new to Ohio, the original proposal read: "No person, with purpose to deprive the owner of property or services, shall knowingly: (1) obtain or

⁷ See *Griffith v. State*, 93 Ohio St. 294, 297, 112 N.E. 1017, 1018 (1915).

⁸ *Lytle v. State*, 31 Ohio St. 196, 199 (1877): "[I]f there are variances between the allegations and the proof offered, the defendant, for that reason alone, must not be acquitted, unless, in the opinion of the court, the variance is material or may be prejudicial to the defendant."

⁹ Final Report of the Technical Committee to Study Ohio Criminal Laws and Procedures, PROPOSED OHIO CRIMINAL CODE (1971) [hereinafter cited as PROP. OHIO CRIM. CODE]. The text of the proposed legislation is incorporated in HOUSE BILL NUMBER 511, 109th Ohio General Assembly (1971) [hereinafter cited as H.B. NO. 511].

¹⁰ PROP. OHIO CRIM. CODE, Introduction at ix.

¹¹ PROP. OHIO CRIM. CODE (as amended in SUBSTITUTE HOUSE BILL NUMBER 511) [hereinafter cited as SUB. H.B. NO. 511].

exert control over either without the consent of the owner or person authorized to give consent; (2) obtain control over either by threat."¹² For purposes of consolidation, the key words are "obtain or exert control" because, in a single phrase, they bring together in one statute the old offenses of larceny and embezzlement. It is unfortunate that these important terms are not defined in the Proposed Code so as to make the intended effect of the law more explicit. Illinois, using language similar to that of the Ohio Proposed Code, did specify the definitions of these words. The Illinois law provides that "obtain" means: "(a) In relation to property, to bring about a transfer of interest or possession, whether to the offender or to another, and (b) In relation to labor or services, to secure the performance thereof."¹³ Also, the Illinois law provides that the phrase "obtains or exerts control" "includes but is not limited to the taking, carrying away, or the sale, conveyance, or transfer of title to, or interest in, or possession of property."¹⁴ Unlike the present law, the proposed formulation of theft would not require a determination of technical questions such as whether the original taking was lawful or trespassory. Rather, the focus would be on whether the accused acted without the consent of the owner or beyond the authorized control; if either is found to be the case, the actor may be convicted of theft.

The second phrase of the theft statute carries the consolidation further by containing a prohibition against obtaining control "by threat." Again, unfortunately, the Proposed Code fails to define an essential term. Early drafts of the working papers of the Technical Committee indicate that a rather extensive definition was contemplated¹⁵ to distinguish a threat made to accomplish a theft from similar offenses such as robbery and extortion. While some overlapping may be unavoidable, the legislature should indicate the bounds in which courts are expected to impose liability for theft by threat.

In the original proposal, a parallel but separate section was included in the chapter on theft and fraud which proscribed theft "by deception."¹⁶ (Such a provision is needed to encompass the existing offenses of larceny by trick and false pretense.) The decision by the Technical Committee to segregate the new fraud offense was justified on the ground that the

¹² PROP. OHIO CRIM. CODE § 2913.02(A). The final version of this important section reads:

No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either: (1) without the consent of the owner or person authorized to give consent; (2) beyond the scope of the express or implied consent of the owner or person authorized to give consent; (3) by deception; (4) by threat.

¹³ ILL. ANN. STAT. ch. 38, § 15-7 (Smith-Hurd 1970).

¹⁴ *Id.* § 15-8.

¹⁵ The Technical Committee to Study Ohio Criminal Laws and Procedures, Draft No. 39 (Dec. 10, 1968).

¹⁶ PROP. OHIO CRIM. CODE § 2913.41.

element of deceit made it sufficiently distinct to warrant separate treatment. This choice would have been acceptable if the Technical Committee had recommended the adoption of a general consolidation provision similar to that suggested in the Model Penal Code:

Conduct denominated theft in this Article constitutes a single offense embracing the separate offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this Article, notwithstanding the specification of a different manner in the indictment or information, subject only to the power of the Court to ensure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or surprise.¹⁷

Without such a provision, the Proposed Code would have fallen short of the optimum consolidation effort since it would still be a guessing game to determine in some cases whether the facts would support a charge under one statute or another. Happily, this contingency was precluded by the House of Representatives which put the deception language back into the basic theft provision, § 2913.02. Consequently, the Proposed Code offers a unified and rational statute covering almost any conceivable kind of acquisitive behavior.

III. THE OFFENSE OF THEFT

A. *Subject Matter of Theft*

In delineating the scope of the subject matter for which theft liability can be imposed, the Proposed Code is written to remedy some of the present law's shortcomings. The theft section, as mentioned earlier, would extend liability for misappropriating "property or services." While personal property has always been protected, the new definition of property would include "any property, real or personal, tangible or intangible, and any interest or license in such property."¹⁸ Such a definition cannot be faulted for being too restrictive since it seems virtually all-inclusive. Indeed, it can be argued that the definition goes too far. The Model Penal Code draws a distinction between movable and immovable property, and in respect to the latter, disallows the possibility that it can be the subject of theft.¹⁹ In explaining this distinction, a commentary to an early draft of the Model Penal Code suggests that since realty is stationary, the doctrine of adverse possession provides an adequate civil remedy so that no criminal law intervention is needed. Furthermore, as the commentary points out, failure to

¹⁷ MODEL PENAL CODE [hereinafter cited as M.P.C.] § 223.1 (Proposed Official Draft, 1961) [hereinafter cited as P.O.D.].

¹⁸ PROP. OHIO CRIM. CODE § 2901.01(J) (as amended in SUB. H.B. NO. 511).

¹⁹ M.P.C. § 223.0(4) (P.O.D.).

exclude real property could involve the criminal process in a landlord-tenant dispute in a situation where a lessee deliberately overstayed his lease.²⁰ While such a possibility might be avoided by judicial construction, the decision should not be left to the courts unless the legislature specifically intends theft liability to be so extended.

The inclusion of services in the theft offense does represent a major innovation in Ohio law. "Services" is broadly defined to encompass "labor, personal services, professional services, public utility services, food, drink, transportation, and entertainment."²¹ Clearly, theft liability can be imposed for misappropriating services which are ordinarily available only for compensation. Among such services are a haircut and a house call by a physician. Illinois, following the suggestion of an early draft of the Model Penal Code, restricted its theft liability to those services available "for hire."²² Although the Illinois and Model Penal Code formulations were considered by the drafters of the Ohio Proposed Code,²³ the definition of services contains no such restriction. As passed by the House of Representatives, the proposal seems to leave open the possibility of a prosecution for using services for which no compensation was expected. The only suggestion to the contrary is found in the section defining deprivation of services. That section prohibits accepting services with the purpose of not giving "*proper* consideration in return therefor."²⁴ Thus, it can be argued that proper consideration can only be determined when the services were for hire.

B. *The Culpable Mental State*

According to the traditional concepts of criminal law, there is usually no crime unless an act is coupled with a specified mental state. Making no great change from the present law, the Proposed Code adopts this premise in the theft offense: "No person, *with purpose to deprive* the owner of property or services, shall *knowingly* obtain or exert control over either. . . ."²⁵ Fortunately, all of the operative terms of this *mens rea* require-

²⁰ M.P.C. § 206.1(2)(a), Comment at 63 (Tent. Draft No. 1, 1953).

²¹ PROP. OHIO CRIM. CODE § 2913.01(E). The final version passed by the House also includes a new section which specifically prohibits fraudulently hiring certain kinds of vehicles or fraudulently engaging hotel, motel, or campground accommodations. PROP. OHIO CRIM. CODE § 2913.41 (as amended in SUB. H.B. NO. 511).

²² ILL. ANN. STAT. ch. 38, § 16-3 (Smith-Hurd P.P. 1972). See generally M.P.C. § 206.7, Comment at 91 (Tent. Draft No. 2, 1954).

²³ PROP. OHIO CRIM. CODE, Introduction at viii.

²⁴ PROP. OHIO CRIM. CODE § 2913.01(C)(3) (as amended in SUB. H.B. NO. 511) (emphasis supplied). The value of services would be based on fair market value, a concept which is defined in amended § 2913.61(D)(3) as:

[T]he money consideration which a buyer would give and a seller would accept for property or services, assuming that the buyer is willing to buy and the seller is willing to sell, that both are fully informed as to all facts material to the transaction, and that neither is under any compulsion to act.

²⁵ *Id.* § 2913.02(A) (emphasis supplied).

ment are carefully defined. One acts purposely "when it is his specific intention to cause a certain result. . . ."²⁶ In this section, the result which must be specifically intended by the actor is to "deprive" another of property or services which means to:

- (1) Withhold property of another permanently, or for such period as to appropriate a substantial portion of its value or use, or with purpose to restore it only upon payment of a reward or other consideration;
- (2) Dispose of property so as to make it unlikely that the owner will recover it;
- (3) Accept, use, or appropriate money, property, or services, with purpose not to give proper consideration in return therefor.²⁷

It is not required that the actor intend that the owner never recover his property, or that the owner receive no consideration for his property or services. Rather, a flexible standard is established which sets a more reasonable understanding of deprivation from the perspective of the victim of the theft. The burden is upon the prosecution, however, to demonstrate that the act of obtaining or exerting control was concurrent with a purpose to deprive as defined above.

The theft section appears to add another mental element to the offense, namely, that the actor "knowingly" obtain or exert control over property or services. If knowledge is all that is required, a less culpable mental state is involved, for all that need be shown is that the actor was "aware that his conduct [was] likely to cause a certain result. . . ."²⁸ Doubt is cast upon the significance of the knowledge requirement by the existence of a fraud section in the original proposal which, although exactly parallel to the theft section, omits any mention of knowledge.²⁹ A court reading the House-passed version of the Proposed Code may conclude, however, that purpose must be proved only with respect to deprivation, and that for all other elements of the offense, proof of knowledge is sufficient for conviction.

C. *Ownership and Consent*

Another prerequisite to conviction for theft under the Proposed Code is the unauthorized exercise of control over property or services; that is, control either without the consent of the owner or person authorized to give consent, or beyond the scope of the express or implied consent given. "Owner" is defined (with some unnecessary circularity) as "any person, other than the actor, who is the owner of, or who has possession or control of, or any license in any interest in property or services, even though such

²⁶ *Id.* § 2901.22(A).

²⁷ *Id.* § 2913.01(C).

²⁸ *Id.* § 2901.22(B).

²⁹ PROP. OHIO CRIM. CODE § 2913.41.

ownership, possession, control, license, or interest is unlawful."³⁰ Insofar as this definition allows one who stole from another thief to be prosecuted for theft, there is no change in Ohio law.³¹ However, the language is designed to leave no doubt that one can be guilty of theft from a co-owner, a partner, or a spouse. In regard to the last-mentioned class, spousal theft, the Proposed Code breaks with the Model Penal Code which would allow a prosecution only if the theft had occurred after the parties ceased living together.³² While it is possible that the courts may become more involved in family disputes due to the abrogation of spousal immunity for theft, there is no good reason to grant immunity to a thief simply because he is married to his victim.

From the absence of a definition of "consent," it appears that the legislature did not intend to alter the traditional meaning of that term. In an early draft of the Model Penal Code, it was suggested that effective consent excludes "(i) consent obtained by deception or coercion; and (ii) consent of one who is manifestly disqualified by youth, mental defect, intoxication, or the like, to make reasonable property disposition."³³ Since such a definition would make explicit the common law construction of consent, it can be argued that the definition ought to be in the Proposed Code. Because no change will result either from inclusion or exclusion, the proposal is really not weakened by the absence of an explicit definition.

D. *Affirmative Defenses*

An additional topic to be discussed in regard to theft is affirmative defenses. The original version of the Proposed Code contained three explicit affirmative defenses to a charge of theft:

- (1) The actor was unaware that the property or service involved was that of another.
- (2) The actor acted under an honest claim of right to acquire, keep, or dispose of the property or service involved as he did.
- (3) The actor took property exposed for sale, intending to purchase and pay for it promptly, or reasonably believing that the owner, if present, would have consented.³⁴

The first and third of these affirmative defenses are merely an application of the theory that mistake of fact, which negates the required mental state (here, purpose to deprive), results in exculpation.³⁵ For instance, if the ac-

³⁰ PROP. OHIO CRIM. CODE § 2913.01(D) (as amended in SUB. H.B. NO. 511).

³¹ *State v. Shoemaker*, 96 Ohio St. 570, 572, 117 N.E. 958 (1917): "If the taking was 'wrongful,' it did not matter who owned the property in question. So far as the thief was concerned it didn't make any difference who owned it. He did not."

³² M.P.C. § 223.1(4) (P.O.D.).

³³ M.P.C. § 206.1(5)(b) (Tent. Draft No. 1, 1953).

³⁴ PROP. OHIO CRIM. CODE § 2913.02(B).

³⁵ *Id.* § 2901.34. The section reads:

tor honestly, but mistakenly, believed property to be his own, or to belong to no one, he is guilty of no culpable wrong in taking it. The second affirmative defense listed above deals with a claim of right, a defense grounded in mistake of law. For example, if a seller mistakenly believed that he had the right to repossess property, the mistake would be one of law rather than of fact. This distinction between mistakes of law and fact is important to the affirmative defenses to theft because of changes made in the Proposed Code as finally passed by the House. First, the affirmative defenses were entirely deleted from the theft section. Second, mistakes of fact which negate the required mental state are recognized while mistakes of law, such as a claim of right defense, are not.³⁶ The consequence of this distinction is the creation of an arbitrary division between two types of mistake, both of which demonstrate the absence of an essential element of criminal liability—a guilty mind. Judging from this consequence, the original formulation of the proposed code was more rational than the version finally passed by the House.

E. *Penalties*

Consistent with the goal of consolidating the theft offenses,³⁷ the penal sanctions provided in the Proposed Code would both update and systematize the present law:

Whoever violates this section is guilty of theft. If the value of the property or services stolen is less than one hundred fifty dollars, violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is one hundred fifty dollars or more, or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, or if the offender has previously been convicted of a theft offense, then violation of this section is grand theft, a felony of the fourth degree.³⁸

The most visible change in the penalties is the shift from sixty³⁹ to one hundred fifty dollars as the dividing line between petty and grand theft. Although the dollar change is little more than a reflection of the decreased value of our currency, it is significant that the grading of offenses was kept intact.⁴⁰ That is, the seriousness of the theft offense is still based on the

Ignorance or mistake as to a matter of fact or law is an affirmative defense to a criminal charge if any of the following apply: (1) The ignorance or mistake plainly negates the culpable mental state required to establish any element of the offense; (2) The section describing the offense provides that ignorance or mistake constitutes a defense.

³⁶ PROP. OHIO CRIM. CODE § 2901.34 (as amended in SUB. H.F. NO. 511).

³⁷ PROP. OHIO CRIM. CODE § 2913.02, Committee Comments at 154.

³⁸ PROP. OHIO CRIM. CODE § 2913.02(B) (as amended in SUB. H.B. NO. 511).

³⁹ OHIO REV. CODE ANN. § 2907.20 (Page Supp. 1970).

⁴⁰ But see M.P.C. § 223.1(2) (P.O.D.). The M.P.C. abandons the traditional two grades of theft in order to establish a third category for offenders who have stolen property of

value of the property or services stolen, and all thefts are either felonies or misdemeanors. Because of the importance of value in determining the sentence the offender is to receive, it is surprising that the original version made no provision for fixing the value of the stolen property or services. Fortunately, the version passed by the House did correct this oversight by providing a rather elaborate section for value determination.⁴¹ Much of the proposed statute would merely codify the existing Ohio common law. For example, the Proposed Code requires the jury to return a finding of the value of the property or services at the time of the offense, but does not require a specification of the exact value if it can be determined that the amount involved is or is not sufficient for a grand theft conviction. One important change in the Proposed Code is that for some property such as personal effects, household goods and business supplies, the value is to be determined by the "cost of *replacing* such property with *new* property of like kind and quality . . . [if the property retains] substantial utility for its purpose regardless of its age or condition. . . ."⁴² The way the proposal is written, replacement value is to be used as the primary method of determining value for such property, and only when this standard is inapplicable is the traditional fair market value formula to be used. Thus, while the value of goods must be greater to result in a conviction for grand theft, the method for determining that value seems calculated to make the one hundred fifty dollar minimum easier for the prosecution to prove. Moreover, there are certain kinds of property which are to be treated as grand theft regardless of actual value. The original proposal would have limited such treatment to credit cards, firearms, and certain kinds of explosives.⁴³ The House amended version, however, would automatically extend grand theft treatment to motor vehicles, checks and certain other negotiable instruments, license plates, and blank forms for certain kinds of certificates of title.⁴⁴

A rather arbitrary approach is suggested for repeat offenders since upon them falls the special opprobrium of grand theft regardless of the value of the property or services stolen either in a past or present offense. The scope of this provision is even broader than it initially appears since "theft offense" is defined to encompass robbery, burglary, breaking and entering, safecracking, tampering with a coin machine, theft (including all of the previously separate crimes such as embezzlement and larceny), unauthorized use of property, passing bad checks, forgery, criminal simulation, making or using slugs, tampering with records, securing writings by

little value (under fifty dollars) and who have not employed force in the commission of the offense.

⁴¹ PROP. OHIO CRIM. CODE § 2913.61 (as amended in SUB. H.B. NO. 511).

⁴² *Id.* § 2913.61(D)(2) (emphasis supplied).

⁴³ PROP. OHIO CRIM. CODE § 2913.02(C).

⁴⁴ PROP. OHIO CRIM. CODE § 2913.71 (as amended in SUB. H.B. NO. 511).

deception, personating an officer, defrauding creditors, cheating, corrupting sports, theft in office, counterfeiting, or conspiracy to commit any of these offenses.⁴⁵ The Proposed Code would be more severe with repeat petty thieves than existing Ohio law, which provides a greater penalty on a second conviction for petty theft, but still classifies the offense as a misdemeanor.⁴⁶ In justifying the new penalty structure making a second conviction for *any* theft offense a felony, it was suggested that since local jails provide little more than "cold storage facilities," the state penitentiary offered a greater chance for rehabilitation.⁴⁷ Whether or not inmates of the state penitentiary are rehabilitated seems at best to be a matter of debate. If lawmakers are intent upon convicting a man for a more serious grade of crime and sentencing him to a longer term of incarceration, the rehabilitation on which such treatment is premised ought to be more than a penological goal. Absent an effective program of rehabilitation, the primary purpose served by the imposition of felony status on a repeat offender is vengeance.

F. *Aggregation*

Aggregation concerns the combining of several offenses into a single prosecution. The original version of the Proposed Code began by stating the traditional Ohio principle:⁴⁸ "Where more than one item of property or services is involved in a theft offense, the value of the property or services involved for the purpose of determining the degree of the offense is the aggregate value of all property or services involved in the offense."⁴⁹ A substantive change in Ohio law was suggested by providing that a series of misdemeanors, if the value of the property or services in each offense were under one hundred fifty dollars, and if the aggregate value were over that amount, *could* be prosecuted as a single felony.⁵⁰ This provision, in the original version of the Proposed Code, was even broader than the one suggested by the Model Penal Code. The Model Penal Code would permit aggregation of a number of petty thefts into a single felony prosecution, but would do so only when the thefts were "committed pursuant to one scheme or course of conduct. . . ."⁵¹ By the time the House completed its revision of the Proposed Code, the section dealing with aggregation had

⁴⁵ *Id.* § 2913.02(K).

⁴⁶ OHIO REV. CODE ANN. § 2907.20 (Page Supp. 1970).

⁴⁷ PROP. OHIO CRIM. CODE § 2913.02, Committee Comments at 158.

⁴⁸ *State v. Hennessey*, 23 Ohio St. 339, 349 (1872): "Where several articles of property are stolen at the same time, the transaction being the same, the whole, although they belong to different owners, may be embraced in one count of the indictment, and the taking thereof charged as one offense."

⁴⁹ PROP. OHIO CRIM. CODE § 2913.61(A).

⁵⁰ *Id.* § 2913.61(B).

⁵¹ M.P.C. § 223.1(2)(c) (P.O.D.).

been cut back considerably. The final version would allow aggregation of offenses only when the thefts were committed "by the offender in his same employment, capacity, or relationship to another. . . ."⁵² The House-amended version makes it less likely that petty thefts can be aggregated, and also less likely that judges will be able to employ the "swing sentence" approach to treat a felony as a misdemeanor for sentencing purposes.⁵³ Thus, a series of unrelated offenses will probably result in a more severe sanction under the final version since the judge will not have the discretion to view the offenses as a single transgression.

IV. OFFENSES RELATED TO THEFT

A. *Unauthorized Use*

It should be noted that the basic theft provision, § 2913.02, while the most sweeping of all sections dealing with theft and deception, is only one part of the comprehensive treatment of such crimes. Subsequent sections modify and expand the law in this area. Perhaps the most important modification is the distinction made between stealing property and merely using it: "No person shall knowingly use or operate the property of another without the consent of the owner or person authorized to give consent."⁵⁴ To satisfy the *mens rea* element of this section, the unauthorized use of property requires only a knowing⁵⁵ use or operation. The concept is similar to an existing Ohio law which forbids unauthorized use of any motor vehicle.⁵⁶ In adopting the theory that use is a less serious offense than deprivation, the Proposed Code extends the idea to encompass all property, but sets a higher penalty if the property involved is an "aircraft, motor vehicle, motorboat, or other motor-propelled vehicle. . . ."⁵⁷ Unlike the theft provision, the section dealing with unauthorized use does contain explicit affirmative defenses. That is, if the actor reasonably believed that he was authorized to use or operate the property, or if he reasonably believed that the owner or person empowered to give consent would have authorized the use or operation of the property, there is no culpability and no crime.⁵⁸

⁵² PROP. OHIO CRIM. CODE § 2913.61(C) (as amended in SUB. H.B. NO. 511).

⁵³ *Id.* § 2929.05(G).

⁵⁴ *Id.* § 2913.04(A).

⁵⁵ PROP. OHIO CRIM. CODE § 2901.22.

⁵⁶ OHIO REV. CODE ANN. § 4549.04(B) (Page 1965).

⁵⁷ PROP. OHIO CRIM. CODE § 2913.03 (as amended in SUB. H.B. NO. 511). If a vehicle is merely being operated without the owner's consent, the offense is a first-degree misdemeanor. If, however, the vehicle is kept for more than two days, or if it is removed from the state, or if the offender has previously been convicted of a theft offense, the crime is considered a fourth-degree felony.

⁵⁸ *Id.* §§ 2913.03(C) and 2913.04(B).

B. *Criminal Conversion*

An extension of the law of theft was suggested in the original proposal by the creation of the offense of criminal conversion:

No person, who comes into control of property of another which he knows was lost, mislaid, or delivered under mistake as to its nature, amount, or value, or as to the identity of the recipient, shall, with purpose to deprive the owner thereof, fail to take reasonable measures to restore the property to a person entitled to have it.⁵⁹

The proposal was designed to cover those situations where property comes into one's hands fortuitously, and thereafter is converted by the finder to his own use or ownership. The proposed section was drafted in terms of "control" to avoid any possibility of creating an absolute duty to take steps to return lost or mislaid property. Furthermore, by requiring "reasonable measures" to be taken, the proposal would have allowed a flexible determination of what those measures would be, based on considerations such as the value of the misplaced property and the likelihood of finding the true owner. The impact of the statute would have been to compel the finder of property to take steps to return it to the rightful owner. Unfortunately, the House-amended version of the Proposed Code deleted this section entirely. It should be noted that much of the behavior which was intended to be covered by the criminal conversion provision may be punished under the theft or unauthorized use sections. Without a specific provision dealing with lost or mislaid property, however, it may be difficult for the prosecution to show a purpose to deprive or a knowing use of another's property. The original version of the Proposed Code seems to have been better designed to discourage this kind of antisocial behavior.

C. *Receiving Stolen Property*

Another section which expands the basic theft offense is that of receiving stolen property. Although this is not a new crime, the Proposed Code does work a few significant changes in its formulation: "No person shall receive, retain, or dispose of the property of another, knowing or having reasonable cause to believe it has been obtained through commission of a theft offense."⁶⁰ Unlike present Ohio law, which requires the prosecutor to prove that the receiver of property had knowledge that it was stolen,⁶¹ the Proposed Code would only require proof that the actor should have known that the property was obtained by a theft offense.⁶² Under the original proposal, the accused was given a chance at exculpation: "This sec-

⁵⁹ PROP. OHIO CRIM. CODE § 2913.03(A).

⁶⁰ PROP. OHIO CRIM. CODE § 2913.51(A) (as amended in SUB. H.B. NO. 511).

⁶¹ OHIO REV. CODE ANN. § 2907.30 (Page 1954): "No person shall buy, receive, or conceal anything of value which has been stolen . . . knowing it to have been stolen. . . ."

⁶² See note 60 *supra*, and the statute cited.

tion does not apply to a person who receives, retains, or disposes of property with purpose to restore it to the owner."⁶³ Such an exception is only reasonable since there can be no justification in imposing liability on one who had no intent to make the property his own. The House-amended version, however, deletes this provision.

It is not clear why the section on receiving stolen property does not include a provision, as suggested by the Model Penal Code,⁶⁴ which would raise a presumption of knowledge in one who deals in stolen property. Since the unavailability of a fence for stolen property would tend to make any organized theft operation economically unfeasible, and since potential dealers might be deterred by the prospect of a more certain conviction, there is good reason to include such a provision.

V. OFFENSES COMMITTED THROUGH DECEPTION

A. *Fraud*

As indicated earlier, fraud is now covered in the proposed theft offense section: "No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either . . . by deception."⁶⁵ The word "by," which precedes the word "deception," indicates the need to demonstrate a causal connection between the deceit and the appropriation in order to win a conviction under this provision. Thus, as an element of the offense, it is incumbent upon the prosecution to show that there was a knowing deception to satisfy the *mens rea* requirement.⁶⁶

As for the meaning of deception as used in this chapter, the Proposed Code offers an extremely broad definition:

'Deception' means knowingly deceiving another or causing another to be deceived, by any false or misleading representation, by withholding information, by preventing another from acquiring information, or by any other conduct, act, or omission which creates, confirms, or perpetuates a false impression in another, including a false impression as to law, value, state of mind, or other objective or subjective fact.⁶⁷

Insofar as the proposed definition proscribes creating a false or misleading impression to appropriate another's property, there is no major change in Ohio law.⁶⁸ The Proposed Code, like the Model Penal Code,⁶⁹ would ex-

⁶³ PROP. OHIO CRIM. CODE § 2913.51(B).

⁶⁴ M.P.C. § 223.6 (P.O.D.).

⁶⁵ PROP. OHIO CRIM. CODE § 2913.02 (as amended in SUB. H.B. NO. 511).

⁶⁶ *Id.* § 2901.21(A)(2): "[A] person is not guilty of an offense unless . . . he has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense."

⁶⁷ *Id.* § 2913.01(A).

⁶⁸ OHIO REV. CODE ANN. § 2907.21 (Page Supp. 1970): "No person shall obtain possession of, or title to, anything of value with the consent of the person from whom he obtained it, provided he induced such consent by false or fraudulent representation, pretense, token, or writing."

⁶⁹ M.P.C. § 223.3 (P.O.D.).

tend liability for fraud to those situations where the actor prevented the victim from acquiring information which would dispel a falsely created impression, or where the actor confirmed a pre-existing false impression. Indeed, the draft finally approved by the House would seem to go farther by making illegal "withholding information . . . which . . . confirms or perpetuates a false impression in another" ⁷⁰ This language does not preclude the possibility that one could be held liable for fraud for failure to correct a false impression held by the victim, even though the actor did not create that impression. Consequently, this language is unlike that in the Model Penal Code which penalizes only a failure to dispel a false impression *not* created by the actor when there is a confidential or fiduciary relationship between the parties.⁷¹ The proposed Ohio law would seem to leave open the interpretation that there is an absolute duty of full disclosure of all relevant information. For example, consider the situation of a mine owner, who, having discovered that his mine was nearly exhausted of ore, sells it to a stranger even though the seller was fully aware that the buyer was under the mistaken belief that the property was still valuable as a mine.⁷² Under the Proposed Code definition of deception, there is no reason why the disappointed buyer could not press charges on the ground that the seller had withheld information which perpetuated a false impression in the mind of the buyer. Furthermore, the buyer would argue that there existed the requisite "purpose to deprive" when the seller accepted the money of the buyer "with purpose not to give proper consideration in return therefor."⁷³ It is doubtful that the drafters of the Proposed Code intended such a result, and it is also possible that the courts may refuse to read the provision to allow a seller to be prosecuted for what has long been an accepted commercial practice—getting the benefit of the bargain. Of course, the simplest way to avoid this untoward consequence would be to change the language of the definition of deception.

On a related subject, by failing to include a provision dealing with deceptive business practices, the Proposed Code seems to have fallen short of creating a comprehensive and effective system to guard against fraud. Although such a provision was considered by the drafters of the original proposal,⁷⁴ patterned after the Model Penal Code,⁷⁵ there is no mention of it in the Proposed Code as introduced in the House of Representatives. There appear to be three reasons for inclusion in the criminal code of a provision

⁷⁰ PROP. OHIO CRIM. CODE § 2913.01(A) (as amended in SUB. H.B. NO. 511).

⁷¹ M.P.C. § 223.3(c) (P.O.D.).

⁷² M.P.C. § 206.2, Comment at 67 (Tent. Draft No. 2, 1954).

⁷³ See PROP. OHIO CRIM. CODE §§ 2913.41, 2913.01(A), and 2913.01(C)(3) (as amended in SUB. H.B. NO. 511).

⁷⁴ The Technical Committee to Study Ohio Criminal Laws and Procedures, Draft No. 41 (G) at 1 (Dec. 4, 1968).

⁷⁵ M.P.C. § 224.7 (P.O.D.).

aimed at eliminating deceptive business practices: (1) It is advantageous to bring the various categories of deceptive practice together in a single section for consistent treatment of common issues such as *mens rea* and punishment;⁷⁶ (2) Businessmen are usually assumed to know about or have means of obtaining correct information in their particular portion of the business world, so recklessness should suffice to convict the accused;⁷⁷ and (3) Considering the potential for harm in situations such as possessing a false weight or measure, there is little reason to wait until the deceiver has actually obtained property, or even comes so close as to fall within the compass of the attempt statute.⁷⁸ Should the version of the law ultimately adopted not contain a section specifically concerned with deceptive business practices, there is language in the Proposed Code which could be used to punish many kinds of such deceit. In addition to the possibility of prosecution of an individual for fraud or attempted fraud, the Proposed Code provides for organizational liability,⁷⁹ and also for personal accountability for organizational misconduct.⁸⁰

B. *Forgery, Criminal Simulation, and Tampering with Records*

Three sections included in the theft and fraud chapter forbid acts done with "purpose to defraud." These are forgery,⁸¹ criminal simulation,⁸² and tampering with records.⁸³ To defraud is to "knowingly obtain, by deception, some benefit for oneself or another, or to knowingly cause, by deception, some detriment to another."⁸⁴ To fall within the prohibition of one of these provisions, then, it is not necessary to show that an act was done to advantage the actor, but only that the actor was aware that his conduct was likely to result in some detriment to the victim of the deceit.

Forgery, while not a new crime, would be newly defined to mean: "to fabricate or create, in whole or in part and by any means, any spurious writing, or to make, execute, alter, complete, reproduce, or otherwise purport to authenticate any writing, when such writing in fact is not authenticated thereby."⁸⁵ Furthermore, in keeping with a general theme of consolidation through definition, "writing" means: "any document, letter, memorandum, note, paper, plate, film, or other thing having in or upon it any

⁷⁶ M.P.C. § 206.46, Comment at 123 (Tent. Draft No. 2, 1954).

⁷⁷ The Technical Committee to Study Ohio Criminal Laws and Procedures, Draft No. 41(G) at 2 (Dec. 4, 1968).

⁷⁸ M.P.C. § 206.24, Comment at 121 (Tent. Draft No. 2, 1954).

⁷⁹ PROP. OHIO CRIM. CODE § 2901.23 (as amended in SUB. H.B. No. 511).

⁸⁰ *Id.* § 2901.24.

⁸¹ *Id.* § 2913.31.

⁸² *Id.* § 2913.32.

⁸³ *Id.* § 2913.42.

⁸⁴ *Id.* § 2913.01(B).

⁸⁵ *Id.* § 2913.01(G).

written, typewritten, or printed matter, and also means any token, stamp, seal, credit card, badge, trademark, label, or other symbol of value, right, privilege, license, or identification."⁸⁶ It would be hard to conceive of a type of forgery that would not fall within the ambit of such a statute.

A companion section to the forgery provision is tampering with records; this forbids the falsification, destruction, removal, concealment, alteration, defacement, or mutilation of any writing or record. It is interesting that while forgery provides but a single penalty for that offense, tampering with records carries a penalty which is dependent upon the kind of record with which the offender has tampered.⁸⁷

Criminal simulation likewise carries only a single penalty, but that is because there is but a single kind of harm proscribed by the section. This offense would be new to Ohio since it would forbid one to

make or alter any object so that it appears to have value because of antiquity, rarity, curiosity, source, or authorship, which it does not in fact possess . . . or practice deception in making, retouching, editing, or reproducing any photograph, movie film, video tape, phonograph record, or recording tape. . . .⁸⁸

If adopted, this proposal would extend to the falsification of objects the same sanction provided for misrepresenting writings, that is, forgery. Criminal simulation, like the sections on forgery and tampering with records, includes a prohibition against "uttering." This means that one may not "issue, publish, transfer, use, put or send into circulation, deliver, or display"⁸⁹ any writing or object which had been falsified in contravention of the Proposed Code.

C. *Personation, Securing Writings by Deception, and Fraud in Insolvency*

Three other sections relating to deception, while presenting nothing new to Ohio law, do make some noteworthy changes. The first of these concerns personating⁹⁰ an officer, which includes in addition to a law enforcement officer, "an inspector, investigator, or agent of any governmental agency."⁹¹ Unfortunately, "governmental agency" is not defined; as a result, there remains uncertainty as to what organizations are intended to be covered. It is clear from the statute, however, that personation would be

⁸⁶ *Id.* § 2913.01(F).

⁸⁷ *Id.* § 2913.42(B): "If the writing or record is a will unrevoked at the time of the offense, or a record kept by or belonging to a governmental agency, tampering with records is a felony of the fourth degree."

⁸⁸ *Id.* § 2913.32.

⁸⁹ *Id.* § 2913.01(H).

⁹⁰ "Personate" is the correct legal term for this offense. BLACK'S LAW DICTIONARY 1301 (4th ed. 1968).

⁹¹ PROP. OHIO CRIM. CODE § 2913.44 (as amended in SUB. H.B. NO. 511).

unlawful when done with purpose to defraud, with knowledge of facilitation of a fraud, or with purpose to induce another to purchase property or services.⁹²

The second fraud-related offense appears to be merely a spin-off of the basic fraud section since it prohibits causing another, by deception, to execute a writing "which disposes of or encumbers property, or by which a pecuniary obligation is incurred."⁹³ This provision would broaden existing law by expanding the scope of the present offense dealing with unlawful procurement of a signature.⁹⁴

A similar expansion of Ohio law would be effected by adoption of the section which prohibits fraud in insolvency.⁹⁵ The Proposed Code would make illegal certain acts, such as concealing or conveying property to frustrate the interests of creditors. It is interesting to note that while present Ohio law⁹⁶ applies to any debtor, the original proposal would have applied only to a debtor who knew that "proceedings have been or are about to be instituted for the appointment of a fiduciary, or that an assignment or any other arrangement for the benefit of creditors has been or is about to be made. . . ."⁹⁷ Clearly, the restriction was designed to limit the interposition of the criminal process into debtor-creditor relationships to those situations where the debtor was, or was soon likely to be, insolvent. This is the approach recommended by the Model Penal Code.⁹⁸ The House-amended version of the Proposed Code rejected that approach, however, and re-drafted the section so that it could be used against any debtor, not just against an insolvent one.

D. *Slugs, Checks, and Credit Cards*

Remaining in the chapter on theft and fraud are three sections peculiar to our modern economic way of life. The first deals with making or using slugs for a coin machine.⁹⁹ As is often done in the Proposed Code, change is brought about through definition of the operative terms. In this section, present law is expanded by defining "coin machine" to mean "any mechanical or electronic device designed to do both of the following: (1) receive a coin or bill, or token made for that purpose; (2) in return for the insertion or deposit of a coin, bill, or token, automatically dispense property, provide a service, or grant a license."¹⁰⁰ By using such broad lan-

⁹² *Id.*

⁹³ *Id.* § 2913.43.

⁹⁴ OHIO REV. CODE ANN. § 2911.01 (Page Supp. 1970).

⁹⁵ PROP. OHIO CRIM. CODE § 2913.45 (as amended in SUB. H.B. NO. 511).

⁹⁶ OHIO REV. CODE ANN. § 2911.12 (Page 1954).

⁹⁷ PROP. OHIO CRIM. CODE § 2913.45.

⁹⁸ M.P.C. § 224.11 (P.O.D.).

⁹⁹ PROP. OHIO CRIM. CODE § 2913.33 (as amended in SUB. H.B. NO. 511).

¹⁰⁰ *Id.* § 2913.01(I).

guage, the Proposed Code would allow the coverage of the law to keep pace with the advance of machine technology.

Passing bad checks under the Proposed Code would, of course, still be unlawful: "No person, with purpose to defraud, shall issue or transfer or cause to be issued or transferred a check or other negotiable instrument, knowing that it will be dishonored."¹⁰¹ The section goes farther by providing that a rebuttable presumption of knowledge arises when: (1) the drawer had no account with the drawee at the time of the issue or the stated date, whichever is later; or (2) the dishonored instrument is not made good by the drawer or indorser within ten days of receiving notice of the instrument's having been dishonored.¹⁰² Although it is unusual to put the burden on the accused to come forward with evidence that there was no fraudulent intent, the reasoning of the Model Penal Code seems sufficient to support this exception in the case of bad checks:

In the fictitious account situation it is possible but highly improbable that the transaction was innocent: the drawer may absent-mindedly have put the name of the wrong bank in a blank check, or he may have intended to open an account before the check was presented. In the case of checks on real but inadequate accounts, the chance of innocent miscalculation by the drawer is much greater but is pretty well negated by a refusal to make the check good promptly. The amounts involved may be small, and the drawer may be a transient against whom swift action must be taken. It seems appropriate therefore to create a basis for arresting him without further proof of fraudulent purpose, putting the burden on him to come forward with some evidence of innocent mistake.¹⁰³

To use the words of the Technical Committee in summarizing the effect of the revision of the law in respect to credit cards, it is "in most respects, substantively the same as the existing law governing improper transactions involving credit cards."¹⁰⁴ It is noteworthy that there is a need only for a section dealing with misuse of credit cards, since this exemplifies some of the advantages which flow from the systemization and consolidation of the law of theft and fraud. Because many of the sections previously discussed in this note deal with misconduct which could involve credit cards (theft, fraud or receiving stolen property), there is no need to reiterate such offenses in regard to this specific form of property. Instead, there is a need to consider only those problems which present a unique danger from misuse of this particular kind of property. For instance, the Proposed Code would prohibit knowingly buying or selling a credit card from or to a person other than the issuer.¹⁰⁵ Unlike most other kinds of trans-

¹⁰¹ *Id.* § 2913.11(A).

¹⁰² *Id.* § 2913.11(B).

¹⁰³ M.P.C. § 206.22, Comment at 118 (Tent. Draft No. 2, 1954).

¹⁰⁴ PROP. OHIO CRIM. CODE § 2913.21, Committee Comments at 163.

¹⁰⁵ PROP. OHIO CRIM. CODE § 2913.21(A)(2) (as amended in SUB. H.B. NO. 511).

actions in property, there can be no lawful justification for dealing in credit cards; hence, the need for such a provision. Furthermore, under the Proposed Code, making such a transaction a transgression would not be dependent on the future misuse of the card in obtaining goods or services. Rather, the transaction itself would be a misdemeanor. If, however, the card were subsequently used to obtain goods or services valued at one hundred fifty dollars or more, the actor would be subject to a felony prosecution.¹⁰⁶

VI. CONCLUSION

The Proposed Code succeeds in putting the law of theft and fraud into a uniform and concise set of provisions. By reducing the sheer bulk of the existing law, by re-drafting the offenses to reflect contemporary concepts of criminology, and by employing modern legal language, the proposed revision would advance the law appreciably. As is inevitable in any broad revision of the law, there are some shortcomings in this chapter. Some confusion may be occasioned, for example, by the failure to adequately define some of the important terms. It can be anticipated that the changes in the Proposed Code will cause transitional problems as old concepts are abandoned in favor of new ones. The existence of such problems, however, should not unduly derogate this laudable effort to effect a badly needed reform in the Ohio law of theft and deception.

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¹⁰⁶ *Id.* § 2913.21(D).